

U.S. Department of Labor

Solicitor of Labor
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MEMORANDUM FOR: BRENT ORRELL
Acting Assistant Secretary for Employment and
Training Administration

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SUBJECT: Mandating That States Workforce Agencies Verify
Employment Eligibility of Workers Referred on
H-2A-Related Job Orders

This memorandum describes the legislative and regulatory authority for the Department of Labor (DOL) to require State Workforce Agencies (SWAs) to verify the employment eligibility of workers referred by SWAs to jobs for which an employer is seeking a labor certification for temporary agricultural employment. It further explains that section 274A of the Immigration and Nationality Act (INA) (8 U.S.C. 1324a) and its implementing regulations, which are administered by the Department of Homeland Security (DHS), do not prevent SWAs from verifying the employment eligibility of prospective agricultural referrals, as is required by the statutes and regulations administered by DOL.

Under the agricultural temporary labor certification (H-2A) program, the Department of Homeland Security may not approve petitions for the admission of foreign temporary and seasonal farmworkers on H-2A visas unless DOL first certifies that able, willing, qualified U.S. workers are not available for the work, and that employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. INA 101(a)(15)(H)(ii)(a), 214(c), and 218 (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188). To establish the unavailability of U.S. workers, the petitioning employer must test the U.S. labor market for "eligible individuals" under procedures set forth by DOL. INA 218(c)(3)(A) (8 U.S.C. 1188(c)(3)(A)). Such individuals include eligible persons referred to the employer. *Id.* The authorizing legislation spells out further that an eligible person is, "with respect to employment, an individual who is not an unauthorized alien ... with respect to that employment." INA 218(i)(1) (8 U.S.C. 1188(i)(1)) (emphasis added).

As part of the labor market test for U.S. workers, DOL requires petitioning employers to file job orders with SWAs requesting the referral of eligible workers. 20 CFR 655.101(c)(4), 655.103(d)(1). DOL has a long-established system to facilitate the recruitment and referral of workers in agriculture, authorized by the Wagner-Peyser Act (29 U.S.C. 49 et seq.) and implemented at 20 CFR Parts 651, 653, 654, and 658. The system is operated in partnership with the SWAs, which receive grants from DOL under both the Wagner-Peyser Act and the INA for such activities.

As part of the recruitment/referral system, SWAs receive orders from employers for workers and applications from workers for employment. When workers contact a SWA to obtain job referrals to agricultural jobs and other services, the SWA must “determine whether or not applicants are MSFWs [migrant and seasonal farm workers] as defined at §651.10 of this chapter.” 20 CFR 653.103(a). Agricultural or farm worker is defined in regulation as “a worker, whose primary work experience has been in farmwork ..., whether alien or citizen, who is legally allowed to work in the United States.” 20 CFR 651.10 (emphasis added).

On November 14, 2007, the Employment and Training Administration (ETA) issued to all grantee SWAs Training and Employment Guidance Letter (TEGL) No. 11-07, Change 1. 72 Fed. Reg. 65355 (Nov. 20, 2007). The purpose of the letter was “to further clarify certain procedures for State Workforce Agencies (SWAs) and Employment and Training Administration (ETA) National Processing Centers (NPCs) involved in the processing of H-2A labor certification applications for temporary agricultural employment of foreign workers in the United States (U.S.).”

Among the clarifications included in the TEGL was an instruction to SWAs intended to strengthen the integrity of the Secretary's determination whether there are able, willing, qualified, and available U.S. workers who are eligible for the open position, and to help build employers' confidence in their local SWAs and the H-2A program. The letter clarified the SWAs' obligation, described above, to verify the employment eligibility of prospective U.S. workers before referring them to an employer under a job order in support of an H-2A labor certification application.

Since the TEGL was issued, a number of SWAs have contacted DOL expressing confusion about the extent of their legal obligations. The concerns expressed by SWAs break down into three basic questions. First, do section 274A of the INA (8 U.S.C. 1324a) and its implementing regulations permit SWAs to verify the work eligibility of agricultural workers before they are referred to open jobs? Second, do section 218 of the INA (8 U.S.C. 1188), 20 CFR 651.10, 20 CFR 655.106(a), and TEGL No. 11-07, Change 1 legitimately require SWAs to verify the eligibility of agricultural workers? Third, must SWAs facing financial difficulties nonetheless comply with these requirements? This memorandum addresses each of these questions in turn.

1. Do section 274A of the INA (8 U.S.C. 1324a) and its implementing regulations permit SWAs to verify the work eligibility of agricultural workers before referring them to open jobs?

Yes. According to U.S. Citizenship and Immigration Services (USCIS) guidance, typically only employers are permitted to use the I-9 and E-Verify employment verification processes. See Handbook for Employers: Instructions for Completing the Form I-9 (available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>). Furthermore, when employers use the I-9 and E-Verify employment verification processes, they generally are limited to conducting verification after a hiring decision has already been made, and are not permitted to use employment verification to pre-screen job applicants.

See *id.* at page 21, questions 3 and 4. SWAs, by contrast, are not employers of agricultural workers, and referrals generally occur in advance of the agricultural employer's decision to hire the worker referred. Some SWAs have expressed concerns that this guidance effectively prohibits them from complying with the employment eligibility verification requirements described in TEGL No. 11-07, Change 1.

These concerns are misplaced. INA 274A(a)(5) (8 USC 1324a(a)(5)), entitled "Use of State employment agency documentation," expressly provides that SWAs may participate in the employment verification system described in INA 274A(b) (8 USC 1324a(b)). The implementing regulations for those sections further provide that "[p]ursuant to sections 274A(a)(5) and 274A(b) of the Act, a state employment agency . . . may, but is not required to, verify identity and employment eligibility of individuals referred for employment by the agency." 8 CFR 274a.6(a). The DHS regulations define "state workforce agency" as "any State government unit designated to cooperate with the United States Employment Service in the operation of the public employment service system." 8 CFR 274a.1(i). Further, DHS's Handbook for Employers: Instructions for Completing the Form I-9, at page 27, question 46 states that "State employment agencies may elect to provide persons they refer with a certification of employment eligibility." Thus, the INA clearly permits SWAs to verify the eligibility of agricultural workers before making referrals.

2. Do section 218 of the INA, 20 CFR 651.10, 20 CFR 655.106(a), and TEGL No. 11-07, Change 1 legitimately require SWAs to verify the eligibility of agricultural workers?

Yes. INA 218(c)(3)(A) (8 USC 1188(c)(3)(A)) mandates that DOL issue a labor certification "not later than 30 days before the date such labor or services are first required to be performed . . . if (1) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and (2) the employer does not actually have, or has not been provided referrals of, qualified eligible individuals who have indicated their ability to perform such labor or services." (Emphasis added). DOL has fulfilled its statutory mandate by instructing SWAs via regulation and through TEGL No. 11-07, Change 1 that workers cannot be referred to employers unless the SWA first determines that the worker is "able, willing, and eligible" to take the job. 20 CFR 655.106(a). Eligibility is clearly defined by the INA to mean "with respect to employment, an individual who is not an unauthorized alien . . . with respect to that employment." INA 218(i)(1) (8 USC 1188(i)(1)). (Emphasis added).

DOL has also required by regulation that all local SWA offices must "determine whether or not applicants are MSFWs [migrant and seasonal farmworkers] as defined at 20 CFR § 651.10 of this chapter." 20 CFR § 653.103(a). "Farmworker" is defined by 20 CFR 651.10 as an "agricultural worker," which is in turn defined as "a worker, whose primary work experience has been in farmwork . . . whether alien or citizen, who is legally authorized to work in the United States." (Emphasis added).

Some SWAs have expressed the view that they are not required formally to verify the employment eligibility of agricultural workers through the employment verification system set forth at INA 274A(b) because 20 CFR § 655.106(a) states that "no U.S. worker-applicant shall

be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.” (Emphasis added). These SWAs have interpreted this language to mean they can fully satisfy their obligation to verify the work-eligibility of agricultural workers merely by securing an informal self-certification of work eligibility from the workers to be referred. Such a reading misconstrues the Department of Labor’s regulation. Before referring agricultural workers to open jobs, SWAs are required to verify that the workers are qualified, able, willing, and eligible to perform the job. As the plain language of the regulation indicates, SWAs are indeed required to secure a worker’s acceptance of a referral before it may formally be made. Such acceptance constitutes full evidence that the worker is willing to perform the job. This provision has never been understood, however, to mean that SWAs may uncritically accept a worker’s self-certification as to qualification or ability to perform a job, and the provision does not mean that SWAs may uncritically accept a worker’s self-certification as to work eligibility, either. Such a self-certification regime with respect to work eligibility would be entirely meaningless and is inconsistent with the more rigorous verification requirements established by the 1986 enactment of INA 274A (8 U.S.C. 1324a). To fulfill their legal obligation to verify work eligibility of prospective referrals, SWAs are required, at a minimum, to utilize the employment verification system set forth in INA 274A(b) (8 U.S.C. 1324a(b)). To the extent 20 CFR § 655.106(a) may have seemed ambiguous on this point in the absence of further clarification, DOL definitely resolved the proper interpretation of its regulation in TEGL No. 11-07, Change 1, and that interpretation is binding on all SWA grantees.

Even if 20 CFR 655.106(a) were deemed ambiguous with respect to the manner in which SWAs are required to verify work eligibility, however, the independent verification obligation set forth in 20 CFR 655.10 unambiguously requires SWAs to determine whether applicants are migrant and seasonal farmworkers, who must by definition be “legally authorized to work in the United States.” There is no reference in 20 CFR 655.10 to self-certification of work eligibility. SWAs are thus required, at a minimum, to verify employment eligibility as set forth in INA 274A(b) (8 U.S.C. 1324a(b)) when determining the work-eligibility of agricultural workers.

Other SWAs have expressed the view that they cannot be required formally to verify the employment eligibility of agricultural workers because 8 CFR 274a.6 states that “a state employment agency ... may, but is not required to, verify identity and employment eligibility of individuals referred for employment by the agency.” (Emphasis added). This interpretation misunderstands the purpose of the DHS regulation. 8 CFR 274a.6 is intended to clarify that even though SWAs are not employers of the workers they refer, SWAs are nonetheless permitted to use the employment verification system administered by DHS. The statement that SWAs are “not required to” use the employment verification system merely clarifies that DHS is not, by implementing this exception to the normal rule that only employers can verify work eligibility, exercising its own authority to require SWAs to do so.

The DHS regulation does not in any way interfere with or diminish the obligation of SWAs to verify work eligibility pursuant to other statutory and regulatory authorities, including those administered by DOL. *See* November 6, 2007 letter from Gus P. Coldebella, DHS General Counsel, Acting, to Gregory F. Jacob, Senior Advisor to the Secretary of Labor (“The purpose of § 274a.6 is to delineate the requirements that DHS places on those SWAs that choose to verify identity and employment eligibility, as they are authorized to do under INA 274A(a)(5). It is my opinion that the language in the regulation – i.e., ‘is not required to’ – does not bar another agency that may have authority to do so from requiring SWAs to verify identity and employment eligibility of individuals referred for employment by the SWA.”).

3. Must SWAs facing financial difficulties nonetheless comply with employment eligibility verification requirements?

Yes. States are not required to participate in the Wagner-Peyser Act programs and receive financial grants for such participation. However, as a condition for receipt of such grants, the grant-making agency may set forth standards under which the grantee must operate programs pursuant to the grant. “A valid grant condition imposed by or pursuant to a federal statute is binding on the recipient and will prevail over inconsistent state law....” Office of the General Counsel, United States Government Accountability Office, Principles of Federal Appropriations Law (3rd ed.), vol. 2, ch. 10, Pt. C, sec. 1.b (Feb. 2006); see Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000); and Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C.Cir.1981).

As interpreted by TEGL No. 11-07, Change 1, the regulations at 20 CFR 651.10, 653.103, and Part 655, Subpart B, represent an appropriate exercise of DOL’s responsibilities under the Immigration and Nationality Act to determine the availability of eligible U.S. workers, and under the Wagner-Peyser Act to bring together employers and jobseekers efficiently and effectively.

DOL understands that foreign labor certification and Wagner-Peyser funds may not fully cover all of the costs of operating those programs. That federal subsidies may not be sufficient to fully cover operating costs, however, is not an excuse for failing to comply with all applicable legal requirements. SWAs accepting foreign labor certification and Wagner-Peyser funding must refer qualified, able, willing, and eligible workers to job openings; must conduct timely housing inspections under the H-2A program; and must verify the employment eligibility of agricultural workers before referring them to agricultural job openings. Failure to satisfy any of these requirements would constitute a breach of legal obligations.

DOL notes, however, that it has proposed legislation that would enable it to better fund SWA operating costs under the H-2A program. Currently, DOL is authorized to charge H-2A program users a fee for each H-2A application, but all fees received are required to be deposited in the general Treasury account instead of being used to fund program operating costs. DOL’s legislative proposal would allow the Department to instead apply all fees received directly to program administration, including the operating costs of SWAs. Enactment of the Department’s legislative proposal would substantially improve the H-2A funding situation for SWAs.